***United States Court of Appeals***

***for the***

***District of Columbia Circuit***


# TRANSCRIPT OF RECORD

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# Court of Appeals, District of Columbia

**OCTOBER TERM, 1906.**

No. 3 Special Calendar
January Term 1907

No. 1738.

468

**No. 21, SPECIAL CALENDAR.**

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DISTRICT OF COLUMBIA, PLAINTIFF IN ERROR,

*vs.*

GALEN E. GREEN.

---

IN ERROR TO THE POLICE COURT OF THE DISTRICT OF COLUMBIA.

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**FILED OCTOBER 29, 1906.**

# COURT OF APPEALS OF THE DISTRICT OF COLUMBIA.

**OCTOBER TERM, 1906.**

No. 3 Special Calenda..
January Term 1907

No. 1738.

**No. 21, SPECIAL CALENDAR.**

DISTRICT OF COLUMBIA, PLAINTIFF IN ERROR,

*vs.*

GALEN E. GREEN.

IN ERROR TO THE POLICE COURT OF THE DISTRICT OF COLUMBIA.

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GEO. E. HOWARD, PRINTER, WASHINGTON, D. C., NOVEMBER 1, 1906.

# In the Court of Appeals of the District of Columbia.

No. 1738.

DISTRICT OF COLUMBIA, Plaintiff in Error,
*vs.*
GALEN E. GREEN.

a No. 294,443.

In the Police Court of the District of Columbia.

October Term, 1906.

DISTRICT OF COLUMBIA
*vs.*
GALEN E. GREEN.

Information for Nuisance.

Be it remembered, That in the Police Court of the District of Columbia, at the City of Washington, in the said District, at the times hereinafter mentioned, the following papers were filed and proceedings had in the above entitled cause, to wit:

1 (*Information.*)

In the Police Court of the District of Columbia, September Term, A. D. 1906.

THE DISTRICT OF COLUMBIA, *ss:*

Edward H. Thomas, Esq., Corporation Counsel, who for the District of Columbia prosecutes in this behalf in his proper person, comes here into Court, and causes the Court to be informed and complains that Galen E. Green, late of the District of Columbia aforesaid, on the 18th day of September, in the year A. D., nineteen hundred and six, in the District aforesaid, and in the City of Washington, near unto the dwelling houses of divers good citizens of the District of Columbia, to wit: Lot 25, Square 1197, did then and there commit, create, and maintain a nuisance injurious to health, consisting of an accumulation of filth on said lot and a rank overgrowth of weeds four inches or more in height; which is contrary to and in violation of an Act of Congress approved March 1st, 1899, and constituting a law of the District of Columbia.

EDWARD H. THOMAS,
*Corporation Counsel.*

Personally appeared E. W. Whittaker, this 27th day of September, A. D., 1906, and made oath before me that the facts set forth in the foregoing information are true.

[SEAL.] L. F. ENGLESBY,
*Deputy Clerk of the Police Court of the District of Columbia.*

*(Motion to Quash.)*

2 In the Police Court of the District of Columbia.

No. 294,443.

DISTRICT OF COLUMBIA
*vs.*
GALEN E. GREEN.

Now comes the defendant by John Ridout his attorney, appearing specially for the purposes of this motion and not otherwise, and moves the Court to quash the information herein and for grounds for this motion says:

1. That said information does not charge any offense against any law in force in the said District.

2. The law under which the said information is purported to have been filed is unconstitutional and void because:

A. It does not afford due process of law to defendant.

B. It is unreasonable on its face.

C. It lacks the requisite uniformity.

D. It is an unlawful attempt to delegate the legislative authority exclusively vested in Congress.

JOHN RIDOUT,
*Attorney for Defendant,*
*Appearing Specially as Aforesaid, and not Otherwise.*

3 *Bill of Exceptions.*

In the Police Court of the District of Columbia.

No. 294,443.

DISTRICT OF COLUMBIA
*vs.*
GALEN E. GREEN.

Be it remembered that at the trial of this cause, which came on for a hearing on the tenth day of October, A. D., 1906, before the Honorable Ivory G. Kimball, one of the Judges of the Police Court of the District of Columbia, the defendant, by

his counsel John Ridout, Esquire, interposed a motion to quash the information in this case filed upon the following grounds to wit:

1. That said information does not charge any offense against any law in force in the District of Columbia.

2. The law under which the said information is purported to have been filed is unconstitutional and void because:

A. It does not afford due process of law to defendant.

B. It is unreasonable on its face.

C. It lacks the requisite uniformity.

D. It is an unlawful attempt to delegate the legislative authority exclusively vested in Congress.

After hearing argument of counsel on said motion the Court ruled as matter of law that the law under which said information was filed is unconstitutional and void on the ground that it lacked the requisite uniformity and sustained the motion to quash on said ground following the decision of the Court of Appeals in the "Snow Case" and ordered the discharge of the defendant.

Whereupon counsel for the District of Columbia excepted to said ruling of the Court, which exception was duly noted
4 by the Court upon his minutes, and thereupon the District of Columbia, by its Counsel, gave notice in open court at the time of said ruling of its intention to apply to a Justice of the Court of Appeals of the District of Columbia for a writ of error.

The District of Columbia, by its counsel, therefore prays the Court to settle, sign and seal this its bill of exceptions, which is accordingly done now for them this 13th day of October, A. D. 1906.

I. G. KIMBALL,
*Judge of the Police Court of the District of Columbia.*

*(Copy of Docket Entries.)*

5 No. 294,443.

In the Police Court of the District of Columbia, September Term, A. D. 1906.

DISTRICT OF COLUMBIA
*vs.*
GALEN E. GREEN.

Information for Nuisance.

Information filed Saturday, September 29, 1906.
Continued to October 10, 1906.
October 10, 1906: Motion to quash information filed. Mo-

tion to quash information argued and sustained. Defendant discharged.

Exceptions taken to the rulings of the Court on matters of law and notice given by the District of Columbia, by its Assistant Corporation Counsel, of its intention to apply to a Justice of the Court of Appeals of the District of Columbia for a writ of error.

October 13, 1906: Bill of exceptions filed, settled and signed.

October 19, 1906: Writ of error received from the Court of Appeals of the District of Columbia.

6 In the Police Court of the District of Columbia.

UNITED STATES OF AMERICA, *District of Columbia, ss:*

I, Joseph Y. Potts, Clerk of the Police Court of the District of Columbia, do hereby certify that the foregoing pages, numbered from 1 to 5 inclusive, to be true copies of originals in cause No. 294,443 wherein the DISTRICT OF COLUMBIA is plaintiff and GALEN E. GREEN defendant, as the same remain upon the files and records of said Court.

In testimony whereof I hereunto subscribe my name and affix the seal of said court, the City of Washington, in said District, this 29th day of October, A. D. 1906.

JOSEPH Y. POTTS,
*Clerk Police Court, Dist. of Columbia.*

7 UNITED STATES OF AMERICA, *ss:*

The President of the United States to the Honorable I. G. Kimball, Judge of the Police Court of the District of Columbia, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said Police Court, before you, between District of Columbia, plaintiff, and Galen E. Green, defendant, a manifest error hath happened, to the great damage of the said plaintiff as by its complaint appears. We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Court of Appeals of the District of Columbia, together with this writ, so that you have the same in the said Court of Appeals at Washington, within 15 days from the date hereof, that the record and proceedings aforesaid being inspected, the said Court of Appeals may cause further to be done therein to correct that error, what of right and

according to the laws and customs of the United States should be done.

Witness the Honorable Seth Shepard, Chief Justice of the said Court of Appeals, the 19th day of October, in the year of our Lord one thousand nine hundred and six.

[Seal Court of Appeals, District of Columbia.]

HENRY W. HODGES,
*Clerk of the Court of Appeals*
*of the District of Columbia.*

Allowed by
SETH SHEPARD,
*Chief Justice of the Court of Appeals*
*of the District of Columbia.*

Endorsed on cover: District of Columbia police court. No. 1738. District of Columbia, plaintiff in error, *vs.* Galen E. Green. Court of Appeals, District of Columbia. Filed Oct. 29, 1906. Henry W. Hodges, clerk.

RETURN TO WRIT OF CERTIORARI

# COURT OF APPEALS, DISTRICT OF COLUMBIA

**JANUARY TERM, 1907**

No. 1738

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**No. 3, SPECIAL CALENDAR**

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DISTRICT OF COLUMBIA, PLAINTIFF IN ERROR,

*vs.*

GALEN E. GREEN

---

IN ERROR TO THE POLICE COURT OF THE DISTRICT OF COLUMBIA

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**FILED JANUARY 16, 1907**

# COURT OF APPEALS, DISTRICT OF COLUMBIA

**JANUARY TERM, 1907.**

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No. 1738.

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**No. 3, SPECIAL CALENDAR.**

---

DISTRICT OF COLUMBIA, PLAINTIFF IN ERROR,

*vs.*

GALEN E. GREEN.

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IN ERROR TO THE POLICE COURT OF THE DISTRICT OF COLUMBIA

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GEO. E. HOWARD, PRINTER, WASHINGTON, D. C., JANUARY 19, 1907

# Court of Appeals, District of Columbia

No. 1738.

DISTRICT OF COLUMBIA, PLAINTIFF IN ERROR,

*vs.*

GALEN E. GREEN.

1 THE UNITED STATES OF AMERICA, *ss:*

[Seal Court of Appeals, District of Columbia.]

The President of the United States of America to the Honorable the Judges of the Police Court of the District of Columbia, Greeting:

Whereas in a certain suit in said Supreme Court between District of Columbia, plaintiff, and Galen E. Green, defendant, Information No. 294,443, which suit was removed to the Court of Appeals of the District of Columbia by writ of error, agreeably to the act of Congress in such case made and provided, a diminution of the record and proceedings of said cause has been suggested, to wit:

Motion for correction of record filed November 8, 1906, and order of Court passed thereon of same date.

Motion to vacate order of November 8, 1906, filed January 7th, 1907, and order of Court of January 10th, overruling same.

2 You, therefore, are hereby commanded that, searching the record and proceedings in said cause, you certify what omissions, to the extent above enumerated, you shall find to the said Court of Appeals, so that you have the same, together with this writ, before the said Court of Appeals forthwith.

Witness the Honorable Seth Shepard, Chief Justice of the said Court of Appeals, the 14th day of January, in the year of our Lord one thousand nine hundred and seven.

HENRY W. HODGES,

*Clerk of the Court of Appeals of the District of Columbia.*

3 [Endorsed:] Court of Appeals of the District of Columbia. No. 1738, January Term, 1907. District of Columbia, Plaintiff in Error, *vs.* Galen E. Green. Writ of Certiorari.

4 No. 294,443.

In the Police Court of the District of Columbia.

October Term, 1906.

DISTRICT OF COLUMBIA
*vs.*
GALEN E. GREEN.

*Information for Nuisance.*

Be it remembered, That in the Police Court of the District of Columbia, at the City of Washington, in the said District, at the times hereinafter mentioned, the following additional papers were filed and proceedings had in the above entitled cause, to wit:

5 *(Motion to Amend Information.)*

In the Police Court of the District of Columbia.

No. 294,443.

DISTRICT OF COLUMBIA
*vs.*
GALEN E. GREEN.

Now comes the defendant and moves the Court to amend the information in this cause as of the date of the trial herein by striking therefrom the words, "an accumulation of filth on said lot, and," and for grounds of said motion, says:

That before trial the said information was by agreement of counsel so amended.

That the whole hearing and argument was had upon such amended information.

That before such trial the attorney for the District of Columbia did in fact strike such words from an information then on trial table which both said counsel and defendant's counsel believed to be information in this cause.

Defendant refers to affidavit of John Ridout, filed herewith.

JOHN RIDOUT,
*Attorney for Defendant.*

6 *(Affidavit of John Ridout, Esquire.)*

In the Police Court of the District of Columbia.

No. 294,443.

DISTRICT OF COLUMBIA
*vs.*
GALEN E. GREEN.

I, John Ridout, on oath say that I am the attorney for the defendant in this cause.

On the day of trial I called Mr. Pugh's attention to the following words in the information in this cause, "an accumulation of filth on said lot, and," and suggested that their presence was really useless and that they tended to confuse the real and vital question in the case.

Thereupon Mr. Pugh took a pen, and in affiant's presence, struck these words out of an information which affiant and Mr. Pugh both believed was the information in this case, and the case went to trial and was argued and decided by the Court upon the information as so amended.

After the bill of exceptions herein was signed, affiant examined it and there was then attached to it a copy of an information from which the words referred to had been stricken out.

Affiant has just discovered from the printed record in the Court of Appeals that in that record the words referred to reappear in the information.

Affiant does not understand how this could have occurred but believes the fact to be that the copy in ink and which affiant then saw attached to the bill was one prepared by or under Mr. Pugh's direction and from which the words quoted had been stricken out, and that later when the record for the Court of Appeals was prepared, the person who prepared that record finding that the words had not been actually stricken out from the proper information, deemed it his duty to include in
7 the record on appeal, a true copy of the record as he found it.

Affiant has inquired of Mr. Pugh, whose recollection fully coincides with his that the words agreed to were actually stricken out of a paper believed to be the information in this cause before the trial was had.

JOHN RIDOUT.

Subscribed and sworn to before me this 8th day of November, 1906.

[SEAL OF POLICE COURT, D. C.] N. C. HARPER,
*Deputy Clerk of the Police Court of the District of Columbia.*

8 (ORDER)

In the Police Court of the District of Columbia.

No. 294,443.

DISTRICT OF COLUMBIA
*vs.*
GALEN E. GREEN.

Upon consideration of the defendant's motion to amend the information *nunc pro tunc*, it is this eighth day of November, 1906, by agreement of counsel, ORDERED that said information be and it is hereby amended, now for the tenth day of October, 1906, so that the words, "an accumulation of filth on said lot and" be and there are stricken therefrom.

We consent,

J. L. PUGH, JR.,
*Assistant Corporation Counsel.*
JOHN RIDOUT,
*Atty. for Deft.*

Allowed:
I. G. KIMBALL,
*Judge, Police Court.*

9 In the Police Court of the District of Columbia.

No. 294,443.

DISTRICT OF COLUMBIA
*vs.*
GALEN E. GREEN.

Now comes the District of Columbia, by Edward H. Thomas, Corporation Counsel, and moves the Court to set aside, vacate and annul its order of the 8th day of November, 1906, and all changes, if any, attempted to be made in the information and record of said cause by virtue thereof.

1. Because the warrant issued on the 27th day of September, 1906, on the face thereof without change, shows that the charge against the defendant Galen E. Green was and is that he on the 18th day of September, 1906, and at the other times therein set forth created and maintained a nuisance on lot 25, Square 1197 in the District of Columbia which was injurious to health, consisting of an accumulation of filth on said lot.

2. Because the information filed on the 27th day of September charged the said defendant as to said lot and at said times with committing, creating and maintaining a nuisance injurious to health consisting of an accumulation of filth on said lot and a rank overgrowth of weeds four inches or more in height.

3. Because there are two motions to quash filed by defendant's counsel and in one of them the defendant's counsel recognized that the charge was as above set forth in said warrant and information by setting forth in said motion that he moved "the Court to quash the information herein so far as it charges the defendant with allowing the presence of weeds on the lot described in the information under Act of March 1, 1899."

10 4. Because the said information as above set forth was quashed by the Court on the 10th day of October, 1906; that the bill of exceptions based solely thereon was settled, signed and filed on the 13th day of October, 1906; that writ of error thereon was granted by the Court of Appeals and received by the Police Court on the 19th day of October, 1906, and the said record was duly certified together with said writ of error to the said Court of Appeals on the 29th day of October, 1906, all within the October Term of said Police Court and that said Police Court was without jurisdiction or authority on the 8th day of November, 1906, and after the close of said October Term to change, alter or amend said information, or to direct or allow the same to be done, and its said order of amendment was improvidently and unlawfully made.

5. Because the Corporation Counsel did not consent to the said change, though requested so to do, and did not authorize any assistant to consent or agree to such change.

6. That any pretended consent or agreement to said change of information after the close of the October term was made after the said cause had passed out of the jurisdiction of the said Police Court and beyond the authority of the Assistant Corporation Counsel at the Police Court; and that such consent, if given, did not confer jurisdiction on said Police Court to make said change in said information.

7. That no change or amendment was in fact made in said information after it was filed.

(Signed) E. H. THOMAS,
*Corporation Counsel.*

11 In the Police Court of the District of Columbia.

No. 294,443.

DISTRICT OF COLUMBIA
*vs.*
GALEN E. GREEN.

Upon consideration of the motion of the District of Columbia, by its counsel, to vacate and set aside the order passed in this case on the eighth day of November, 1906, and after argument of counsel on both sides, it is, by the Court, this 10th day of January, 1907, ORDERED, that the said motion be, and the same hereby is, overruled.

To the granting of this order counsel for the District of Columbia objected and excepted and gave notice in open Court of his intention to apply to the Court of Appeals to review the action of this Court in overruling said motion.

By the Court,

(Signed) I. G. KIMBALL,
*Judge, Police Court, D. C.*

12 *(Copy of Additional Docket Entries.)*

No. 294,443.

In the Police Court of the District of Columbia.

OCTOBER TERM, A. D. 1906.

DISTRICT OF COLUMBIA
*vs.*
GALEN E. GREEN.

*Information for Nuisance.*

November 8, 1906: Motion filed by Attorney for the defendant to amend the information.

Affidavit of John Ridout, Esq., in support of said motion, filed.

Upon consideration of said motion it is, by agreement of council, ORDERED by the Court that said information be amended *nunc pro tunc* as prayed in said motion.

January 5, 1907: Motion filed by the Corporation Counsel, in behalf of the District of Columbia, to vacate and annul order of November 8, 1906, amending the information filed in this cause.

January 10, 1907: Upon consideration of motion to vacate and annul order of November 8, 1906, amending information filed in this cause, it is ORDERED that said motion to vacate and annul be overruled.

To said ruling of the Court counsel for the District of Columbia objected and excepted and gave notice in open Court of his intention to apply to the Court of Appeals to review the action of this Court in overruling said motion.

January 14, 1907: Writ of Certiorari received from the Court of Appeals of the District of Columbia.

13 In the Police Court of the District of Columbia.

UNITED STATES OF AMERICA, *District of Columbia, ss:*

I, Joseph Y. Potts, Clerk of the Police Court of the District of Columbia, do hereby certify that the foregoing pages, numbered from 1 to 8, inclusive, to be true copies of originals in cause No. 294,443 wherein the District of Columbia is plaintiff and Galen E. Green defendant, as the same remain upon the files and records of said Court.

In testimony whereof I hereunto subscribe my name and affix the seal of said Court, the City of Washington, in said District, this 16th day of January, A. D. 1907.

JOSEPH Y. POTTS,

[SEAL.] *Clerk Police Court, Dist. of Columbia.*

14 In the Police Court of the District of Columbia.

No. 294,443.

DISTRICT OF COLUMBIA
*vs.*
GALEN E. GREEN.

In obedience to the Writ of Certiorari issued by the Court of Appeals of the District of Columbia in the above entitled cause directed to the Judges of the Police Court of the District of Columbia I herewith transmit to said Court of Appeals certified copies of following, to wit:

Motion for correction of record filed November 8, 1906, and order of Court passed thereon of same date.

Motion to vacate order of November 8, 1906, filed January 5, 1907, and order of Court of January 10 overruling same.

Given under my hand and the seal of said Police Court this 16th day of January, A. D. 1907.

[SEAL.] JOSEPH Y. POTTS,

*Clerk of the Police Court of the District of Columbia.*

Endorsed on cover: No. 1738. District of Columbia, Plaintiff in Error, *vs.* Galen E. Green. Return to Writ of Certiorari. Court of Appeals, District of Columbia. Filed January 16, 1907. Henry W. Hodges, Clerk.

COURT OF APPEALS,
DISTRICT OF COLUMBIA
FILED.

MAR 4 - 1907

Henry W. Hodges
Clerk.

# Court of Appeals, District of Columbia

FEBRUARY TERM, 1907

No. 1738

**No. 3. SPECIAL CALENDAR**

DISTRICT OF COLUMBIA, PLAINTIFF IN ERROR

v.

GALEN E. GREEN

## Brief for Plaintiff in Error

EDWARD H. THOMAS,
*Attorney for Plaintiff in Error*

10'15 GEO. E. HOWARD, PR.

IN THE

# Court of Appeals, District of Columbia

FEBRUARY TERM, 1907

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No. 1738

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**No. 3, SPECIAL CALENDAR**

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DISTRICT OF COLUMBIA, PLAINTIFF IN ERROR

*v.*

GALEN E. GREEN

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## Brief for Plaintiff in Error

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### STATEMENT OF THE CASE

The defendant in error was prosecuted by information in the Police Court for permitting a nuisance injurious to health on a certain lot "consisting of an accumulation of filth on said lot and a rank overgrowth of weeds four inches or more in height." (R., 1.) On the 10th day of October, 1906, the Police Court quashed

this information, exceptions being duly noted. On the 13th of October following the bill of exceptions was settled and signed; on the 19th of October this Court granted a writ of error and the record was filed here on the 29th of October. There were two motions to quash filed by the defendant in error. The first asked the Court below to quash the information in so far as it charged the defendant with allowing the presence of weeds on the lot, thus admitting the validity in law of the charge of that part of the information which refers to an accumulation of filth on said lot. Subsequently the defendant in error filed a motion to quash which is found on page 2 of the record, attacking the information on constitutional grounds. After the record was transmitted to this Court, the Police Court, after the term had passed, on the 8th of November, 1906, amended the information by striking out the words therein "an accumulation of filth on said lot and." Subsequently counsel for the plaintiff in error moved the Court below to vacate its order, but the Court refused to do by its further order made on the 10th of January, 1907. (See return to writ of certiorari, R., p. 6.) Exception was duly noted to this ruling, and a motion has been made in this Court to strike from the record all proceedings had in the Court below subsequent to the filing of the original record in this cause in this Court. The act of Congress referred to applicable to the subject of weeds mentioned in the information (approved March 1, 1899, 20 Statutes, 959) is as follows:

> "Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That it shall be the duty of the owner, occupant, or agent in charge of any land in the city of Washington, District of Columbia, or in the more densely populated suburbs of said city, to remove from such land any weeds

thereon of four or more inches in height within seven days (Sundays and legal holidays excepted) after notice from the health officer of said District so to do, and upon failure to comply with such notice he or she shall, on conviction thereof, be punished by a fine of not more than ten dollars for each day said notice is not complied with.

"Sec. 2. That whenever there are upon any unoccupied land aforesaid weeds of four or more inches in height, and no person can be found in said District who either is or claims to be the owner thereof, or who either represents or claims to represent such owner as aforesaid, the Commissioners of said District shall give notice, by publication twice a week in one daily newspaper published in the city of Washington aforesaid, requiring their removal. Said notice shall specify the land from which such weeds are to be removed, the character of the work to be done, and the time allowed for doing the same; and if such weeds be not removed within the time so specified, it shall be the duty of said Commissioners to cause their removal; and the cost of such removal, including the cost of advertising, shall be a lien upon and shall be assessed by said Commissioners as a tax against the property on which said weeds were located, and the said tax so assessed shall bear interest at the rate of 10 per centum pen annum till paid, and shall be carried on the regular tax rolls of said District and be collected in the manner provided for the collection of general taxes.

"Sec. 3. That prosecutions under this act shall be in the Police Court of said District upon information filed by the attorney for said District or one of his assistants."

By joint resolution of Congress approved April 4, 1880 (1st Sup. R. S., 574), certain health ordinances were legalized which had been adopted by the Board of Health on November 19, 1875, among which was the following:

> "That filth, the contents of cesspools, offal, garbage, foul water, dye water, refuse from manufacturers, odor, urine, stable manure, decayed animal or vegetable matter, or other offensive substance detrimental to health, thrown, placed, or allowed to remain, in or upon any street, avenue, alley, sidewalk, gutter, public reservation, or open lot, in the cities of Washington or Georgetown, or in the more densely populated suburbs of said cities, are hereby declared nuisances injurious to health; and any person who shall permit, create, or maintain the aforesaid nuisances, or either of them, shall, upon conviction, be fined not less than five nor more than twenty-five dollars for every such offense."

## ASSIGNMENT OF ERRORS

1. The Police Court erred in quashing the information as amended by it.
2. The Police Court erred in quashing the information as it stands without amendment.
3. The Police Court erred in its order of the 8th of November, 1906, in striking out the words "an accumulation of filth on said lot and" from the information, and in refusing to vacate its said order.

## FIRST ASSIGNMENT OF ERROR

The grounds of the motion to quash the information are, that it does not charge any offense; that the law under which it purports to have been filed is uncon-

stitutional and void for want of due process of law, for unreasonableness, for lack of uniformity, and because it is an unlawful attempt to delegate legislative authority. These objections may be considered together.

If Congress is not prevented by some constitutional limitation its authority in relation to the District of Columbia is complete. (Bauman *v.* Ross, 167 U. S., 548; Parsons *v.* District of Columbia, 170 U. S., 45.) The above quoted act of Congress relating to weeds is a valid exercise of legislation by Congress, and may be properly referred to the exercise of the police power. The second section of that act is manifestly not addressed to taxation as a source of revenue, but is addressed to the provision of means for the removal of a nuisance when no person can be found who can be charged with abating it.

> "There are some cases in which levies are made and collected under the general designation of taxes, or under some term employed in revenue laws to indicate a particular class of taxes, where the imposition of the burden may fairly be referred to some other authority than to that branch of the sovereign authority of the state under which the public revenues are apportioned and collected. The reason is, that the imposition has not for its object the raising of revenue, but looks rather to the regulation of relative rights, privileges, and duties as between individuals, to the conservation of order in the political society, to the encouragement of industry, and to the discouragement of pernicious employments. Legislation for these purposes it would seem proper to look upon as being made in the exercise of that authority which is inherent in every sovereignty, to make all such rules and regulations as are needful to secure and preserve the public order,

and to protect each individual in the enjoyment of his own rights and privileges by requiring the observance of rules of order, fairness, and good neighborhood, by all around him. This manifestation of the sovereign authority is usually spoken of as the police power.

"The distinction between a demand of money under the police power and one made under the power to tax is not so much one of form as of substance. The proceedings may be the same in the two cases, though the purpose is essentially different. The one is made for regulation and the other for revenue. If, therefore, the purpose is evident in any particular instance, there can be no difficulty in classifying the case and referring it to the proper power."

Cooley on Taxation, Vol. 2, pp. 1125-1126.

A statute authorizing a city to assess a lot in which a nuisance exists with the entire costs of abating the nuisance by improving the lot, does not violate any constitutional provision, being an exercise of the police power. (Hamilton Special Assessments, Sec. 43.) In Moses *v.* U. S., this Court pointed out the distinction between the exercise of police power under municipal regulations and under an act of Congress respectively; (16 Appeals D. C., 433) and a discussion of the police power will be found in that case and in the cases cited therein. Congress has already declared by the joint resolution above-mentioned that any decaying vegetable matter on an open lot is a nuisance injurious to health, and it prohibited by the act of March 1, 1899, a growth of weeds above a certain height and required the abatement thereof after notice from the health officer. If the act of March 1, 1899, is to be taken as a congressional declaration that such growth of weeds is a nuisance, it can be sustained under the case of Moses *v.* United States and the subsequent cases

upholding that decision, while if the act of March 1, 1899, is not to be taken as an absolute declaration that weeds are injurious to health, such fact is susceptible of proof, and may be an issue to be raised on the trial of the cause. It has, however, been declared that the growth of weeds is such a nuisance that the courts will take judicial notice of that fact and will also take such notice that such growth is injurious to health. A municipal regulation of the city of St. Louis was upheld, which provided as follows: "Sec. 608. Any owner, lessee, or occupant, or any agent, servant, representative, or employee of any such owner, lessee, or occupant, having control of any lot or ground, or any part of any lot who shall allow or maintain on any such lot any growth of weeds to a height of over one foot, shall be deemed guilty of a misdemeanor, and upon conviction shall be fined not less than $10 nor more than $100, to be recovered for the use of the city of St. Louis, before any court having competent jurisdiction."

1. *The courts will take judicial notice* of the fact that a high, rank growth of weeds in a populous community has a strong tendency to produce sickness, and to mar the health of the inhabitants.

2. *A clause in an ordinance forbidding the toleration of weeds on city lots*, specifying that the word shall be held to include rank vegetable growths which exhale unpleasant and noxious odors does not make the ordinance inapplicable to other growths commonly known as weeds.

3. *The rights conferred by the constitutional guaranty of the right to life, liberty and the enjoyment of one's own industry* are held in subordination to the rights of society; so that the owner of a city lot can not permit weeds to grow on his lot if he would thereby endanger the health of others.

4. *Requiring one to cut weeds on his property*

*is not a taking of his property* within the meaning of a constitutional provision that private property shall not be taken for private use, or for public use without compensation.

5. *One is not deprived of his property without due process of law* by an ordinance imposing a penalty for failing to cut the weeds on it, which can not be collected until after a day in court.

6. *Power to require the cutting of weeds on city lots is conferred upon a municipal corporation* by a charter empowering it to abate nuisances on private property to secure the general health of the inhabitants, and to pass such ordinances as may be expedient in maintaining the health and welfare of the city.

St. Louis *v.* Galt, 179 Mo. 8, 63 L. R. A., 778-779.

* * * * * *

The city of Savannah, by ordinance, under authority of the General Assembly, prohibited the cultivation of rice within the corporate limits; and later passed another ordinance, declaring that the cultivation of rice, within the corporate limits of the city, was injurious to the health of the citizens, and providing for the removal and destruction of the growing crops of rice, within the corporate limits of the city, as a nuisance; held that the ordinances were good and valid, and binding upon the inhabitants of the city, as police regulation; and that the mayor and aldermen of the city had the power and authority to judge of and declare, the planting and growing rice within the corporate limits of the city, to be injurious to the health of the city, and a public nuisance, and to abate the same. (Green *v.* Savannah, 6th Ga., pp. 1 and 9 et seq.) This case is an example of the delegation

of power by a legislature to a municipality to adjudge and declare a thing similar to weeds to be a public nuisance. There is, however, as has been shown, no such delegation of authority in this case, for the act of Congress itself requires the abatement of this nuisance, nor can it be said, under the authority of the Moses case, that the defendant had been deprived of due process of law. The defendant has had an opportunity to be heard, and he has had notice and that is all that is necessary for the purpose of providing due process of law. There was no necessity of any previous notice before the notice from the health officer, provided for in the act of March 1, 1899. The cases are collected in Harrinigton *v.* Providence, 38 L. R. A. 305, where it was held:

1. Notice and opportunity to be heard need not be given to a property owner before the passage of an ordinance under statutory authority requiring him to connect his drainage with the sewer and destroy any cesspool on the property.

2. The legislature may declare privy vaults in thickly settled communities to be nuisances, and require them to be abated, without giving their owners opportunity to show in each particular case whether their vault is or is not in fact a nuisance.

3. It is sufficient to authorize the abatement of privy vaults as nuisances that the legislature has so treated them in a statute stated to be for the benefit of the public health, *without a distinct declaration in the statute that they are so.*

4. A statute authorizing the destruction of a privy vault which had been ordered by the municipal authorities to be destroyed notwithstanding an appeal from the order is not unconstitutional.

> 5. It is common knowledge that the condition in which privy vaults shall be kept, when allowed to exist, their construction, their locality, and the time and manner of removing their contents, have, especially in cities, been subjected to sharp police regulation.
>
> Harrington *v.* Providence, 38 L. R. A., 305.

It remains to be seen whether there is such discrimination in the act of March 1, 1899, as to make it lack that uniformity and reasonableness requisite in a constitutional sense in every statute. It is not discrimination, but it is arbitrary and unjust discrimination which is prohibited. This Court said:

> "The only inhibition upon the state is, that the classification of persons and things shall not be arbitrary. If there be some reasonable basis for the classification made it is not obnoxious to the charge of denial of equality."
>
> Moses *v.* U. S., 16 Appeals D. C., 439.

While the above quotation is addressed apparently to the provisions of the Fourteenth Amendment this Court has held that the citizens of this District are protected under the Fifth Amendment and the language quoted is therefore applicable.

An examination of the act of March 1, 1899, shows that Sec. 1 imposes a penalty upon all persons in charge of land, including the owner (as in this case), who refuse to abate the nuisance after notice to do so from the health officer. There is no lack of uniformity or want of equality in any provisions of Sec. 1. Nor is there any discrimination in the provisions of Sec 2, for that section is addressed to all cases where there is no person in charge of or owning the property, and where no such person can be found in the District of Columbia. In such case provision is made for the

removal of the nuisance by the public authorities and the collection of the cost by the assessment of a tax. If there is any discrimination it is in favor of the owner who can be found, for if he can be found his property is not liable to the tax. Where the majority of property owners residing in a city are given the privilege of protest against a certain tax while non-residents were not given such privilege, it was held that such discrimination was not unlawful. The Court said:

> "The exact point of objection is that the improvement is not to be made if a majority of the resident owners of the property liable to taxation therefor shall file with the city clerk a protest against such improvement, which privilege of protest is not given to non-resident owners, thereby discriminating against them. It is well settled, however, that not every discrimination of this character violates constitutional rights. It is not the purpose of the Fourteenth Amendment, as has been frequently held, to prevent the states from classifying the subject of legislation, and making different regulations as to the property of different individuals differently situated. The provision of the Federal Constitution is satisfied if all persons similarly situated are treated alike in privileges conferred or liabilities imposed. (Citing cases.) The alleged discrimination is certainly not an arbitrary one; the presence within the city of the resident property owners, their direct interest in the subject-matter, and their ability to protest promptly if the means employed are objectionable, place them on a distinct footing from the non-resident, whom it may be difficult to reach."
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> Field *v.* Barber Asphalt Co., 194 U. S., 621-622.

## SECOND ASSIGNMENT OF ERROR

The removal of an accumulation of filth on an open lot is required to be done by virtue of the provisions of the health ordinance, and, it seems, that the Court below would have refused to quash the information if the charge that there was an accumulation of filth on this lot had been allowed to remain in the information. There was no objection to the want of form in which the charge of accumulation of filth had been presented in the information. If such objection had been made the information could have been amended before trial (but not after trial).

## THIRD ASSIGNMENT OF ERROR

Section 50, of the Code, provides that the Police Court shall hold a term on the first Monday of every month, and continue the same from day to day as long as it may be necessary for the transaction of its business. Section 44, of the Code, provides that prosecutions in the Police Court shall be on information by the proper prosecuting officer. The term of the Police Court was not continued in this case. The October term of that court lasted until and included the 4th day of November, 1906, but in the meantime, to wit, on October 29, the record in this cause had been completed and transmitted to this Court, and the functions and jurisdiction of the Police Court over the case had ceased and determined. There was no clerical error nor misprison of the clerk. The original information, containing the charges as set out in the original record, was not and is not scratched or altered in any way. In D. C. *v.* Herlihy, 1 Mac. A., 466, it was held that an information could not be amended at the trial even, without being resworn to. In Whitney *v.*

Frisbie, 6 D. C., 271, it was held that after an appeal had been allowed and a bond given, the Supreme Court of this District had no authority to set aside the bond on the ground that it was insufficient. One of the grounds of the decision was: "That after a final decree in this Court and appeal taken according to the statute and the practice of the Court, this Court lost all further jurisdiction of the cause, and the parties, and could make no further order in said case." In Bradley *v.* Galt, 18 D. C., 614, it was held that after a supersedeas bond had been accepted the jurisdiction of the Court and the power of the justice over the subject becomes exhausted, and that consequently any subsequent order of the lower court increasing the penalty of the bond is a nullity. In Leonard *v.* Rodda, 5 Appeals, 256-263, the court below, after a transcript of record (as in this case) had been filed in this Court, dismissed the appeal. This Court said:

> "But it is objected in the second place, that the appeal taken on behalf of the warden of the jail had been dismissed by the justice before whom the proceeding had been had in the court below on the ground that no appeal bond had been filed in the case to perfect the appeal; and that therefore there is no case here before us.
>
> "That the order made by the justice of the court below on January 5, 1895, assuming to dismiss the appeal of the warden, must be regarded as an utter nullity, is perfectly apparent to us. He had no jurisdiction of the case at the time. The transcript of record had been filed in this Court for nearly a month at that time; and the court below was therefore without authority to dismiss the appeal."

It is also to be noted that counsel for the parties and the court below agreed upon the settlement of a bill of exceptions which contained the record of the cause. In Michigan Insurance Banks *v.* Eldred, 143 U. S., 293, it is said:

> "After the term has expired, without the court's control over the case being reserved by standing rule or special order, and especially after a writ of error has been entered in this Court, all authority of the court below to allow a bill of exceptions then first presented, or to alter or amend the bill of exceptions already allowed and filed, is at an end."

It is therefore respectfully submitted that the judgment of the Police Court should be reversed, and the cause remanded for trial.

EDWARD H. THOMAS,
*Attorney for Appellant.*

COURT OF APPEALS,
DISTRICT OF COLUMBIA,
FILED

MAR 6 - 1907

Henry W. Hodges,
Clerk.

IN THE

# Court of Appeals of the District of Columbia.

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DISTRICT OF COLUMBIA
vs.
GALEN F. GREEN
} No. 1

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## Brief For Defendant in Error.

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### STATEMENT OF THE CASE.

In the Court below an information was filed which originally read as it appears in this Record, (R. page 1). Thereupon the defendant, appearing, specially, moved to quash upon certain grounds, (R. p. 2) the one vital to this case being that the act under which the information was filed was void for lack of uniformity.

When the cause was called for trial, counsel for defendant suggested to counsel for the District of Columbia that in order to present a precise and controlling legal question it would be desirable to strike out so much of the information as undertook to charge under the same act the offense of committing a nuisance and the words which it was suggested be stricken out are the following: "an accumulation of filth on said lot and."

Counsel for the District of Columbia concurred in this view, and, taking up a pen, he drew it through certain

words in an information which both he and counsel for defendant believed to be the information in this case, and which were the words suggested to be stricken out.

The Court then heard arguments of both counsel excluding the words agreed to be stricken out and which they and the Court below believed had then actually been stricken out. After full argument the Court below sustained the motion and quashed the information.

To the bill of exceptions when shown to counsel for Defendant in Error was attached a copy of the information in which the aforesaid worde had been stricken out.

Later, after the Record herein had been printed and a copy was sent to defendant's counsel, he discovered that said words had been restored. Thereupon said counsel filed the motion and affidavit (Return to writ pages 2 and 3) as a result of which, and by agreement the said information was corrected as of October 8th, 1906, so as to conform to the fact.

Thereafter counsel for the District of Columbia other than the counsel who tried the case below, filed in the court below a motion to vacate said order of November 8th, 1906, which motion after argument was overruled. The Record of all these steps has been brought up by writ of certiorari.

In point of time, the first question to be considered is the power of the Court below thus to correct a clerical error in its records. The facrs are undisputed. It is submitted that upon both principle and authority it must be that trial courts possess inherent power to do what was done in this case.

The existence of such a power is essential to the due administration of justice. The principle that a Court may,

on motion, correct clerical errors after close of a term is settled by authority in this District.

Phillips vs. Negley, 117 United States 665.

The question is an important one of practice and is entitled to and will doubtless receive the consideration it is entitled to.

In order to appreciate the vital question in the case it is necessary to consider the language of the act relating to weeds which reads thus in substance:

Section 1 provides:

> That it shall be the duty of the owner, occupant or agent in charge of any land in the city of Washington, District of Columbia, or in the more densely populated suburbs of said city to remove from such land any weeds thereon of four or more inches in height within seven days (Sundays and legal holidays excepted) after notice from the health officer of said District so to do and upon failure to comply with such notice he or she shall on conviction thereof be punished by a fine of not more than ten dollars for each day said notice is not complied with.

Section 2 provides in substance:

> That if no person can be found in the District who is or claims to be the owner the Commissioners shall after publication cause the removal of the weeds and assess the cost of so doing as a tax against the lot from which the weeds have been removed.
>
> 30th Statutes 959.

Upon perusal of this act it will at once be seen that it provides one law for residents and another for non-residents. The procedure as to residents being criminal, and as to non-residents civil.

This clearly discloses the absolute lack of uniformity which is essential to the validity of such an act even though it be considered that it embodies a lawful exercise of the so-called police power, under the guise of which so many attacks have been made upon the due process and uniformity clauses in the Constitution.

Fortunately the Court is relieved of much labor in this case because the invalidity of such an act has been settled in this Court in the spirited and ringing opinion in McGuire vs. District of Columbia. 24 Appeals D. C., 22. That case involved the validity of the snow and ice law which the Court declared to be most beneficial in its purpose and which the Court expressed its desire to sustain, yet it found itself unable to do so, and by unanswerable reasoning determined upon the grounds, stated in the opinion, that the act was unconstitutioual.

The act involved in this case is far more vicious in form and its purpose is of doubtful validity.

The question in this case is whether this act through falling within the legislative power of Congress is so framed as that it imposes unequal burdens upon lot owners in the District of Columbia and whether its provisions are or not of general or universal application to all persons similarly situated.

It will be observed that while the duty to remove the weeds is the same as to the owners of all lots, the result of the ommission to perform such duty in the case of a resident lot owner or owners found within the District is to subject such person to a criminal proceeding while in the case of owners not found within the District who fail to remove the weeds the result is to subject the person to a civil and not a criminal proceeding, and the specific duty is cast

upon the Commissioners to remove such weeds and then to assess the cost against the property and collect it as a tax.

In this situation of the provisions of law, the owner of every lot in the District who is a non-resident or not found within the District of Columbia is powerless to defeat the purpose of the law, namely, to have the weeds removed, because if he fails to do it himself, the Commissioners are required to do it: nor can he escape the cost of making such removal, because if he fails to pay if, it is assessed against his property and collected as other taxes. In the case of a resident lot-ower or a non-resident found within the District, however, the purpose of the law, namely, the removal of such weeds, may be defeated altogether by the owner refusing to make the removal and submitting to the punishment provided for such omission, inasmuch as the Commissioners have no power in such cases to make the removal themselves and to assess the cost thereof against such property.

So that in the application of the law, it can beyond all question be made effective in the one case, and wholly defeated in the other. This objection is not met by the suggestion that repeated fines will force an owner of the latter class to finally make the romoval, because if it turns out otherwise the weeds still remains on the property and the purpose of the law, namely. the removal of weeds above a certain height is defeated.

If the purpose of the law is to be effective as against all the property coming within this Act, them the means to make it so must, of course, be found in the Act itself, and yet in the situation described, neither the Commissioners nor anybody else would have any power to enforce such removal as against the resident owner who elects to pay the fine rather than comply with the notice. It would

seem, therefore, that the power of the Commissioners to make such removal and to pay the cost out of the emergency fund and to assess such cost against the property should apply equally to all classes of property, and in the absence of such authority this Act furnishes no uniform and effective means for its enforcement, and therefore it fails to subserve the purpose of its enactment. To put it differently, in the Act under consideration there is apparently one law, namely, a civil one, for owners not found in the District, and another law, namely, a criminal one, for those who are found in the District. As to one class the Commissionert are given the power to make good the requirements of the law as to removing weeds from the lots of owners not found in the District, while as to the other class such power is withheld from the Commissioners.

The Act provides: "That in case the owner or owners of any such lot be a non.resident or non-residents of the District of Columbia, or cannot be found therein," he shall have notice by publication, and in case of failure to comply with such notice by removing the weeds then the Commissioners shall cause such removal to be made and to cause the expense thereof to be assessed against such lots of such owners.

If the language of this section just quoted is to be interpreted as though it read, that in case the owner or owners of such lot *cannot be found* In the District, leaving out the words "be a non-resident or non-residents of the District," which is the most favorable construction that can be given to the Act, we have two separate and distinct classes of persons to which the law has an unequal application so far as their liability is concerned—to the class found in the District, a criminal liability—to the class not so found, a civil liability; and moreover, as already stated, the law is

capable of exact enforcement for the purpose for which it was enacted as to the class of owners not found in the District, while the contrary is true as to those found therein. It follows that the law is unconstitutional.

Even if she Court should be of opinion that the correction of the Record cannot be made, the judgment below was right, being in effect a dismissal of the case because the District of Columbia made no proof whatever nor offored to do so and because the charge of committing a nuisance by permitting an accumulation of filth is in violation of a health regulation, while the act of March 3d, 1869 does not even hint at such an offence, so that the contention that the information as originally framed was bad was well founded upon any view, because of the joinder of inconsistent alleged offenses, made such by totally dissimilar laws.

On the whole it is submitted that the judgment below was right and should be affirmed.

Counsel for Defendant in Error has not yet seen the brief for Plaintiff in Error which has not yet been filed.

This may make it necessary for counsel to obtain leave to file a reply brief.

JOHN RIDOUT,
Attorney for Defendant in Error.